



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 9, 2011

CBCA 2169-TRAV

In the Matter of MARK J. LUMER

Christopher T. Craig of Herge, Sparks & Christopher, McLean, VA, appearing for Claimant.

Sheila Melton, Director, Travel Functional Area, Standards and Compliance, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

BORWICK, Board Judge.

The agency, the Department of the Army, Space and Missile Defense Command (SMDC), and the Defense Accounting and Finance Service (DFAS), seek to recover from claimant, Mr. Mark Lumer, reimbursement for his condominium expenses it had paid him as lodging for nine and one-half years of repeated temporary duty (TDY) in Huntsville, Alabama. Claimant objects. For the reasons below, we grant the claim in substantial part.

Background

Commencing March 29, 1998 the agency sent claimant on repeated short-term TDY tours from his duty station in Washington, D.C., to Huntsville, Alabama. The agency admits that approximately 75% of claimant's time was spent on TDY in Huntsville, Alabama, and other locations. Incident to his anticipated TDY to Huntsville, on March 30, 1998, claimant purchased a condominium in the Huntsville area for \$63,900 and took out a mortgage for \$60,700.

Over the nine and one-half year period between March 1998 and September 2007, the agency sent claimant on TDY 427 times between Washington, D.C., and Huntsville. For those trips through August 2007, claimant stayed in his condominium. Claimant's recurring TDY tours were repeatedly and consistently authorized, and claimant submitted reimbursement vouchers for his lodging that were consistently and without question paid.

During the period from March 1998 until July 2007, the agency did not request receipts for lodging expenses.

Claimant says that “everyone knew” that he was staying in his condominium during his repeated TDY over the nine and one-half year period. Mr. Michael Schexnayder, SMDC’s Deputy Commander for Research, Development and Acquisition, who was claimant’s supervisor and travel approving official from January 2005 until claimant’s retirement in 2008, states that he approved claimant’s TDY to Huntsville. He further states that claimant was authorized by the Joint Travel Regulations (JTR) to be reimbursed while on official travel for the total mortgage interest cost, utilities, and taxes incurred while he stayed in his condominium, that he saw nothing irregular in claimant’s vouchers, and that DFAS paid those vouchers “without question” for “nearly ten years.” Mr. Schexnayder elaborates on the authorization and voucher approval process as follows:

As both the authority that directed [claimant’s] travel and approved the resultant voucher claims, I made the determination that his lodging expenses were reasonable and should be approved for payment. I was authorized to do this by [the Department of Defense] and [the JTR] and I do not see where DFAS has either the authority or basis . . . to now disallow these vouchers after I approved them.

. . . .

Mr. Lumer’s condominium rate . . . is a reduced rate and he was authorized to stay in his condominium at this reduced rate. [Claimant’s] executive assistant . . . used the reduced rate in creating his travel orders and making cost estimates required to support the travel order approval process.

Claimant’s lodging vouchers for that period averaged between \$33 and \$35 per night for his lodging expenses. Claimant says the amount included \$4 for a daily pro-rata share of claimant’s \$110 monthly condominium fee. On his first trip commencing on March 29, 1998, claimant submitted a voucher of \$35 per night for his condominium expenses and was paid. For his second trip, he submitted a voucher for \$35 per day for a two-day trip and was paid. This practice continued throughout the approximate nine and one-half year period. For TDY from January 5 to January 7, 2000, for example, he was reimbursed \$70 for lodging. For a two-day trip to Huntsville between July 18 and July 20, 2005, he was reimbursed \$66 for lodging.

At the Board’s request, the agency provided representative travel authorizations that it could find for each month for the nine and one-half year period. The authorizations

validate Mr. Schexnayder's position that reduced rates were stated in the authorizations. For example, the authorization for November 1, 2006, in block 13b grants an "other rate of per diem" of \$49 instead of the "per diem authorized in accordance with [the] JTR" in block 13a, which would have been \$115. The authorization of July 11, 2005, granted claimant total lodging of \$65 for his two-day stay.

The agency states that claimant's vouchers were paid through three automated voucher payment systems, the integrated automated travel system (IATS), the re-engineered automated travel system (RATS), and the Defense Travel System (DTS).

In July 2007, almost nine and one-half years after commencing payment for his lodging expenses in Huntsville, agency travel officials first informed claimant about the necessity of submitting receipts with his vouchers. Agency travel officials advised claimant that he would be entitled to lodging costs if he could provide the proper receipts and proof that the condominium could not be rented during his absence. As to the question of rental availability, claimant explained that he could not rent the condominium during his absence due to the almost weekly frequency of his trips.

DFAS states that it first audited claimant's vouchers in August of 2007, questioning the approval authority for the vouchers and the lack of receipts. Apparently in response to DFAS's inquiry about receipts, by memorandum of September 23, 2007, citing the 2007 version of JTR C1310-B, claimant stated that providing receipts after a nine-year period was impractical. He noted that the Huntsville utilities kept individual account records for only fifteen months or three years. Appended to claimant's memorandum was a signed note by Mr. Schexnayder that "as [claimant's] immediate supervisor, and as successor in interest of all approval/directing officials for his TDY during fiscal years [2000] through [2006], I hereby determine that the listed expenses are reasonable."

In 2008, the agency determined that claimant owed \$12,092 in lodging expenses for his trips. DFAS submitted the claim to the Board purportedly on behalf of claimant. Claimant denied he desired to file a claim at the Board, accusing DFAS of lying, and stating that he was in the process of suing DFAS for defamation. The Board dismissed the claim for lack of jurisdiction, since DFAS had not sought a decision under 31 U.S.C. § 3529 (2006) (an advance decision) and had not submitted a claim at the request of a claimant. *Mark J. Lumer*, CBCA 1079-TRAV, 08-1 BCA ¶ 33,819.

On or about March 22, 2010, DFAS assessed a debt under the Debt Collection Improvement Act, 31 U.S.C. § 3716(a) (2006), for recoupment of \$25,444.08 from claimant for his lodging expenses associated with his condominium stays while on TDY over a period

of approximately nine and one-half years.¹ Included in that debt claim was \$500 for a special condominium assessment. After an internal record review hearing, by decision of August 27, 2010, DFAS determined that the debt was valid and threatened salary offset unless the agency waived the debt or unless claimant paid the debt in full or established a repayment plan.

On September 27, 2010, claimant filed a claim at this Board. After the filing of the claim, DFAS advised claimant of its proposed wage garnishment to collect the debt. Claimant objected to this Board, asking the Board to enjoin the garnishment. In reply to claimant's objection, DFAS suspended collection of the debt until the decision of this Board on the claim.

Discussion

Laches

Claimant argues that the agency's recoupment claim should be barred by the defense of laches, given the approximate nine and one-half year period of time from claimant's first travel to Huntsville on March 29, 1998, until the agency first notified him of a potential debt in August of 2007. Claimant argues that he has been prejudiced by the delay. Generally, in lawsuits to protect the Government's rights, the equitable defense of laches is not available. *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Popovich*, 820 F.2d 134, 136 (5th Cir. 1987). The Comptroller General, one of our predecessors in deciding travel and relocation claims, held that equitable estoppel, laches's close cousin, did not apply to an agency's demand for overpayment in a relocation case, where, statute and regulations, rather than contract, control the entitlements. *Catherine Evans*, B-202628 (Dec. 30, 1981).²

¹ In a supplemental filing of March 15, 2011, to the Board, the agency maintains that the claim is for refund of lodging "from 2000 to 2007." However, the audit papers attached to the agency response shows that the agency auditors examined claimant's TDY to Huntsville as early as March 6-12, 1998. See Agency Submission (January 18, 2011), Exhibit 2. The agency's record in this case was not helpful to the Board. The record it submitted was unorganized, incomplete, and contradictory.

² Laches is a defense to a suit when there is an unreasonable delay in bringing the suit, to the defendant's prejudice in defending the suit. *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197, 199-200 (2005); *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 13929, 98-2 BCA ¶ 29,758. Equitable estoppel prevents the party being estopped from recovering on a claim when that party has, by its misrepresentation or misconduct relating to the claim, caused the other party to change

For the same reason that equitable estoppel does not apply in refund cases involving travel and relocation, the doctrine of laches does not apply. First, this proceeding is not a suit in a court; it is an administrative settlement proceeding. Second, the agency's claim is founded on statute and regulation, not on contract. Consequently, we conclude that the agency's claim is not barred by laches.

The merits

We now turn to the merits of the agency's claim. The agency maintains that after authorizing and paying for claimant's condominium lodging during claimant's extensive TDY in Huntsville for a period of approximately nine and one-half years, four hundred and twenty seven times by claimant's count, it may now force claimant to repay his lodging reimbursement. If successful, this action would result in depriving claimant of all lodging expenses for that period. The agency's arguments rest on two alleged violations of regulation—lack of lodging receipts and lack of required higher supervisory approval of the reduced lodging rate in claimant's many travel authorizations.

The lodgings plus system for reimbursement for lodging

A government traveler on TDY is entitled to reimbursement for his or her lodging costs as a matter of statutory right. In this regard, statute provides in pertinent part:

(a)(1) Under regulations prescribed pursuant to section 5707 of this title [title 5 of the United States Code], an employee, when traveling on official business away from the employee's designated post of duty, or away from the employee's home or regular place of business . . . is entitled to any one of the following:

(A) a per diem allowance at a rate not to exceed that established by the Administrator of General Services for travel within the continental United States . . . ;

(B) reimbursement for the actual and necessary expenses of official travel not to exceed an amount established by the Administrator for travel within the continental United States . . . ; or

his position in detrimental reliance on the estopped party's misrepresentation or misconduct. *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 59 (1984).

(C) a combination of payments described in subparagraphs (A) and (B) of this paragraph.

5 U.S.C. § 5702.

The Federal Travel Regulation (FTR) in effect when claimant began his repeated TDY in March of 1998, provided for lodging reimbursement under the “lodgings plus” system, which is reimbursement established by the actual amount the traveler pays for lodging plus an allowance for meals and incidental expenses, not to exceed the maximum per diem rate established for the locality of the TDY. 41 CFR 301-7.6 (1997). Receipts were required to support all lodging costs; however, receipts were not required when a specific or reduced rate was authorized in advance of travel. *Id.* 301-7.9(b). Receipts were also not required when the receipts were lost or impractical to obtain. *Id.* 301-7.9(b)(2). In such a circumstance, a statement acceptable to the agency would suffice. *Id.* The FTR allowed deviation from the lodgings plus system when special circumstances allowed a specific rate to be determined in advance and that specific rate was stated in the travel orders issued by the appropriate officials. In such circumstances, the specific rate would be payable to the traveler without receipts or itemization. *Id.* 301-7.10.³

This “lodgings plus per diem” system remained in effect for the next ten years, although the FTR switched to a question and answer format in July of 1998 and re-numbered provisions. In addition to the 1997 version of the FTR, we cite to the 2006 version which was in effect for the last year claimant used his condominium for lodging at Huntsville. As before, per diem expenses were to be reimbursed on the basis of lodgings plus, reduced per diem, or two other methods not relevant to this case. 41 CFR 301-11.5 (2006). The TDY location determined the maximum per diem rate. *Id.* 301-11.7, -11.102. When a traveler secured lodging on a long-term basis, assumed to be rental, the daily lodging cost was computed by dividing the total lodging cost by the rental period, not to exceed the maximum daily per diem rate for the TDY location. *Id.* 301-11.4. The agency could establish a reduced per diem rate in advance of travel by stating that reduced rate on the authorization. *Id.* 301-11.200; *see also* JTR C4550-C (2007).

Under the 1998-2006 version of the FTR, as under the 1997 version, receipts were required for any expense except when the traveler was authorized a fixed, reduced per diem allowance. See 41 CFR 301-52.4(b)(1). Receipts would not have to be provided if it was

³ Note two to JTR C1310-B similarly provides that lodging receipts are not required when a specific or reduced rate has been authorized in accordance with JTR C4550-A, C4560, and C4530-C.

impractical to do so, as long as the failure to provide receipts was fully explained on the travel voucher. *Id.* 301-52.4(b)(2). A lack of receipts submitted with a travel voucher, however, would not permanently render a claim invalid. A traveler could provide missing receipts at a later date. *Id.* at 301-52.11(c).

Since 2000, the FTR has provided that the agency must, as soon as practicable, notify a traveler of any defect in a submitted voucher that would prevent payment within thirty days after submission of the voucher. 41 CFR 301-52.18 (2000). Beginning “not later than May 1, 2002,” the maximum time period for an agency to notify an employee that a claim was not proper is seven working days. *Id.*

Condominium expenses as reimbursable lodging expenses

The General Services Administration Board of Contract Appeals, our predecessor board in handling these cases, held that when an employee purchases a condominium incident to his TDY, and not for the purpose of owning a second residence, that employee is entitled to be reimbursed for his or her daily pro-rata monthly interest, property tax, utility cost, and maintenance fees. *Donald C. Smaltz*, GSBCA 14328-TRAV, 97-2 BCA ¶ 29,311. This Board has followed that precedent. *Christopher L. Andino*, CBCA 957-TRAV, 08-1 BCA ¶ 33,817.

Neither of the agency’s reasons deprives claimant of his statutory right to reimbursement of his lodging expenses. It is clear from the record that claimant purchased his condominium in furtherance of his anticipated multiple TDY tours. The agency issued travel authorizations with reduced rates that reflected his estimated condominium expenses. During the nine and one-half year period of his submitting and being paid for vouchers, no one requested receipts because under regulation, the reduced rate authorizations eliminated the need for receipts. *See, e.g.*, JTR C4550-C (Jan. 2006). Based upon this record, we conclude that the agency’s request for receipts approximately nine and one-half years after claimant commenced his travel was impractical under 41 CFR 301-52.4(b)(2). Claimant is thereby excused from providing receipts to prove his expenses.

The agency claims that the reduced rate authorizations were, for a nine and one-half year period, not validly issued, since they were not signed by the appropriate officials. The January 1, 2007, version of JTR C4550-C and -D, for example, designates the commander of a major command, or a major subordinate command, not subordinate to a major command to which employee’s employing activity reports, as authorized to approve a reduced rate. This authority could be re-delegated and it was. JTR C4550-E lists the Department of the Army, Army Civilian Advisory Panel Member, Department of the Army, Office of the Assistant G-1 for Civilian Personnel, as the designated person.

The agency's failure to bless the reduced rate authorizations with the signatures of authorized officials over an approximate nine and one-half year period rendered the special rate authorizations invalid under the JTR. Claimant, however, is at least entitled to lodging at the commercial rate under the lodgings plus system for each day he was on TDY. *Leland G. Newport*, CBCA 2291-RELO (Apr. 20, 2011). Claimant's condominium expenses that were vouchered, i.e. the taxes, mortgage interest, maintenance and utilities, are recoverable as lodging expenses under the FTR. The \$500 special assessment fee is not. *Andino; Smaltz*. Claimant must reimburse the agency \$500.

The Board returns this matter to the agency for calculation of the total lodging entitlement based on the commercial rate for each day claimant used his condominium while on TDY at Huntsville. If that total is greater than \$24,944.08 (i.e., \$25,444.08 - \$500) claimant may keep \$24,944.08 of his reimbursement. If that total is less, he must refund the difference between the calculated total and \$24,944.08.

ANTHONY S. BORWICK
Board Judge